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ATTORNEY AT LAW

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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April 26, 1999

**BY HAND DELIVERY**

Magalie R. Salas, Secretary  
Federal Communications Commission  
Portals II, TW-A325  
445 Twelfth Street, S.W.  
Washington D.C. 20554

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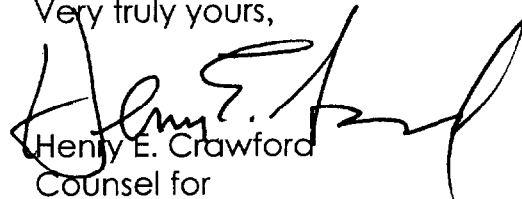
Re: Amendment of Section 73.202(b)  
Table of Allotments FM Broadcast  
Stations  
Palacios, Texas  
MM Docket No. 99-13; RM-9428

Dear Ms. Salas:

Transmitted herewith on behalf of Prawn Broadcasting Company are an original and four (4) copies of its "Motion to Strike" as directed to the Allocations Branch, Policy and Rules Division, Mass Media Bureau.

Should any additional information be required, please contact this office.

Very truly yours,

  
Henry E. Crawford  
Counsel for  
Prawn Broadcasting Company

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C.

In the Matter of

Amendment of Section 73.202(b)  
Table of Allotments  
FM Broadcast Stations  
(Palacios, Bay City, El Campo  
and Matagorda, Texas)

Docket No. 99-13

RM-9428

**RECEIVED**  
**APR 26 1999**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**MOTION TO STRIKE**

Prawn Broadcasting Company ("Prawn Broadcasting"), by counsel, pursuant to 47 CFR §1.45, hereby respectfully submits its *Motion to Strike* in the above-captioned matter. Prawn Broadcasting believes that one of the parties to this proceeding, Sandlin Broadcasting Co., Inc. ("Sandlin"), wrongfully solicited a number of individuals to file *ex parte* comments with the Commission regarding the merits of this rule making docket. None of the resulting documents were appropriately served on counsel and, therefore, the *ex parte* material must be stricken from the record of this proceeding. Additionally, Sandlin, licensee of KMKS(FM), Bay City, Texas should be sanctioned for its conduct in the matter.<sup>1</sup>

In support thereof, the following is stated:

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<sup>1</sup> See, *Elkhart Telephone Company*, 11 FCC Rcd 1165 (1995) (promulgation of unsigned draft letter addressed to Commission to be used by others to influence restricted proceeding required \$5,000.00 forfeiture).

**I. SANDLIN HAS VIOLATED THE COMMISSION'S EX PARTE RULES**

1. The historical purpose of the Commission's *ex parte* rules has been to ensure that Commission decisions are fair and impartial and based on a public record free of influence from non-record communications. Report and Order, Ex Parte Communications, 2 FCC Rcd 3011, 3012 (1987). Therefore, the Commission's Rules strictly prohibit *ex parte* presentations of any kind in restricted proceedings such as the instant rule making. 47 CFR §1.1202(a), 1.1208(a). Any communications directed to the outcome or merits of a restricted proceeding are prohibited. 47 CFR §1.1202(a). It is further unlawful for parties to solicit or encourage others to make a prohibited *ex parte* presentation. 47 CFR §1.1210.

2. In the present case, Sandlin has blatantly violated the *ex parte* rules of the Federal Communications Commission. On March 22, 1999, Prawn Broadcasting filed its Comments and Counterproposal proposing upgraded and new FM services at several Texas communities. Included in the counterproposal was a simple channel change for Sandlin's KMKS(FM). Shortly thereafter, Sandlin apparently circulated an unsigned draft letter and/or other materials to a number of members of the Bay City community urging them to file opposing comments with the FCC. Sandlin did not serve Prawn Broadcasting with copies of this communication.

3. As a direct result of Sandlin's conduct, a number of individuals sent *ex parte* materials to the Commission without perfecting service on Prawn

Broadcasting. Additionally, Sandlin subsequently attached some of these materials to its Reply Comments.

4. An inspection of the documents reveals Sandlin's use of a pre-drafted form letter. For example, a comparison of the letters of Charles Martinez, III and Ernest Opelles<sup>2</sup> shows that they are virtually identical. Moreover, these letters display the same type face and contain an identical blank space for writing in a signature and address. Other letters filed in the docket follow similar form containing only minor variations in language.<sup>3</sup> The form from which these letters were taken contains the docket number and the address of the Commission's Office of the Secretary. It was unquestionably prepared for the sole purpose of influencing the FCC. However, the draft form letter did not advise the individuals of their responsibility to serve counsel for Prawn Broadcasting with their comments.

5. It has long been held by the Commission that a letter sent to outside parties discussing the merits of a case and soliciting support in the form of letters to the Commission will be considered an *ex parte* presentation. Quest for Life, Inc., 10 FCC 2d 220 (Rev. Bd. 1967). This is particularly so where it is clear that the intended purpose of the letter is to cause others to make a presentation to the Commission. Where, as here, local officials and community members have been invited to make presentations to the Commission, an *ex parte* solicitation will be found where the intent is to influence the Commission

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<sup>2</sup> Attached hereto as Exhibit 1. Prawn Broadcasting apologizes in advance for any misreading of the hand written names on these documents.

<sup>3</sup> For example, see letter of Delta A. King which begins with virtually the same language as the Martinez letter.

and the other party is not made aware of the tactics. Quest for Life, Inc., *supra*, at 10 FCC 2d 221, ¶13. See also, Seaford Television Co., 46 RR 2d 1444 (Adm. L. J., 1980); Rainbow Broadcasting Company, 9 FCC Rcd 2839 (1994).

6. Sandlin's conduct is not mitigated by the fact that it attached several of these *ex parte* documents to its pleading. These documents are not mere statements submitted in support of its position in the litigation. These documents demonstrate on their face that they were independently filed in *ex parte* manner several days<sup>4</sup> before the Sandlin Reply Comments. They are addressed directly to the Commission, not to Sandlin. Several letters were not, in fact, attached to the Sandlin pleading.<sup>5</sup> It is clear that Sandlin instigated the effort without advising Prawn Broadcasting and without insuring that the Commission's service rules would be followed. Once the door was opened, the individuals and political entities acted in a wholly independent manner. Attaching these *ex parte* communications to its own pleading cannot cure either the solicitation or the end result.

7. One of the dangers in Sandlin's unlawful conduct can be seen in the fact that Sandlin tried to mislead the Bay City community. The language that appears in several letters makes it appear that Prawn Broadcasting had proposed to eliminate Bay City's FM radio station:

As a resident of Bay City and Magagorda County,  
Texas, I would like to ask that the Commission reject  
the proposal to move FM Channel 102.5 MHz,

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<sup>4</sup> The dates of these documents range from March 31, 1999 to April 2, 1999. Sandlin filed its pleading several days later on April 6, 1999.

<sup>5</sup> The FCC's web page shows filings by Matagorda County Emergency Management, William M. Johnson and Bert L. Huebner. See Exhibit 2.

currently used by KMKS(FM) Bay City, to El Campo, Texas.

This language was apparently cast to make it appear as if KMKS was being threatened with removal from Bay City. Some members of the community do, in fact, state a belief that KMKS is being "removed...from Bay City." Others state that KMKS would not be able to "continue broadcasting as it is doing." Still others were somehow told that this is a case of the "big trying to gobble up the little." Since Sandlin did not serve or otherwise copy Prawn Broadcasting with its solicitation it cannot be said for sure what was said to these parties.

8. It is ironic that Sandlin has attempted to cast Prawn Broadcasting's counterproposal as being contrary to the good of the community. In fact, the Prawn Broadcasting counterproposal will result in two Matagorda County communities receiving FM channel assignments and new or expanded service to 84,140 persons in Matagorda County. No community will lose any existing FM service. On the other hand, in the past, Sandlin had been granted an upgrade to expand the facilities of KMKS(FM) to a full C1. After several years, Sandlin failed to construct the facility and ultimately lost this valuable opportunity to enhance its service to listeners in Matagorda County. Rather than let Sandlin continue to warehouse this frequency any longer, Prawn Broadcasting's proposal allows for a far more efficient and expanded use of the spectrum and a greater service to the whole of Matagorda County.

## **II. CONCLUSION**

9. Strict adherence to the Commission's *ex parte* rules is crucial as the Commission increasingly moves into electronic filing. With the demise of the

Commission's RIPS system and the lack of an electronic filing system in FM allotment cases, it can be impossible to know what has been filed in any given rule making docket. As of this writing, only some of the *ex parte* letters have appeared in the Commission's Electronic Comment Filing System (ECFS). The system is highly unstable and notably incomplete. Therefore, licensees before the Commission need to be extra vigilant in complying with the Commission's service rules.

10. In the present case, Sandlin solicited *ex parte* communications without serving Prawn Broadcasting with the solicitation document. Sandlin further failed to instruct the individuals to serve Prawn Broadcasting with their comments. As a result, a thorough investigation of the matter must be made and the *ex parte* documents purged from the record of this case. Additionally, those parts of the Sandlin pleading that rely on or contain such *ex parte* presentations must be stricken. Sandlin should not be allowed to enjoy the fruit of its ill-gotten gain. Finally, Sandlin, as a Commission licensee should be sanctioned for its violation of the Commission's Rules.

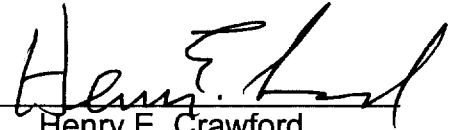
**WHEREFORE**, it is respectfully submitted that all *ex parte* letters be stricken from the instant record and that the Reply Comments filed by Sandlin Broadcasting Co., Inc. be purged of all parts that contain such *ex parte* presentations or rely upon them in any substantive manner.

April 26, 1999

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Respectfully Submitted,

Prawn Broadcasting Company

By:   
Henry E. Crawford  
Its Attorney



Prawn Broadcasting Company  
Motion to Strike  
April 26, 1999

**EXHIBIT 1**

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**April 2, 1999**

**Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
Portals II, TW-A323  
445 Twelfth Street, S.W  
Washington, DC 20554**

**Re: Counterproposal of Pawn Broadcasting  
MM Docket No. 99-13**

**Dear Secretary Salas,**

**As a resident of Bay City and Matagorda County, Texas, I would like to ask that the Commission reject the proposal to move FM Channel 102.5 MHz, currently used by KMKS (FM) Bay City, to El Campo, Texas**

**KMKS at 102.5 has been the emergency station for the county and the station we all rely on for many years. All of the residents of the county know to tune to 102.5 in an emergency situation.**

**I also believe the removal of 102.5 from our county would have a great negative economic impact. I would not like to see the commission move any of our high powered FM station from the community. These stations are a resource not unlike people, water and land.**

**Please say no to any petition or proposal, which would take 102.5 or any other regional frequency from our county.**

**Sincerely,**

*Charles Martinez III*  
2233 Avenue G  
Bay City, Tx 77414

**April 2, 1999**

**Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
Portals II, TW-A323  
445 Twelfth Street, S.W  
Washington, DC 20554**

**Re: Counterproposal of Pawn Broadcasting  
MM Docket No. 99-13**

**Dear Secretary Salas,**

**As a resident of Bay City and Matagorda County, Texas, I would like to ask that the Commission reject the proposal to move FM Channel 102.5 MHz, currently used by KMKS (FM) Bay City, to El Campo, Texas**

**KMKS at 102.5 has been the emergency station for the county and the station we all rely on for many years. All of the residents of the county know to tune to 102.5 in an emergency situation.**

**I also believe the removal of 102.5 from our county would have a great negative economic impact. I would not like to see the commission move any of our high powered FM station from the community. These stations are a resource not unlike people, water and land.**

**Please say no to any petition or proposal, which would take 102.5 or any other regional frequency from our county.**

**Sincerely,**

*Christy Speller*  
2405 Albee E  
Bay City, Tx 77414

Prawn Broadcasting Company  
Motion to Strike  
April 26, 1999

**EXHIBIT 2**



# Federal Communications Commission

Enter New Search Criteria

## 10 Record(s) Found; 10 Contain Document(s)

<b>Proceeding 99-13</b>	<b>Type Code: LT</b>	<b>Date Received: 04/06/99</b>
<b>File Number:</b>	<b>Submission Type: LETTER</b>	<b>Total Pages: 2</b>
<b>Filed on Behalf of:</b> Matagorda County Emergency Management		
<b>Filed By:</b> [REDACTED]		
<b>Proceeding 99-13</b>	<b>Type Code: RC</b>	<b>Date Received: 04/06/99</b>
<b>File Number:</b>	<b>Submission Type: REPLY</b>	<b>Total Pages: 16</b>
	COMM	
<b>Filed on Behalf of:</b> Prawn Broadcasting Company		
<b>Filed By:</b> Henry E. Crawford, Attorney at Law [REDACTED]		
<b>Proceeding 99-13</b>	<b>Type Code: RC</b>	<b>Date Received: 04/06/99</b>
<b>File Number:</b>	<b>Submission Type: REPLY</b>	<b>Total Pages: 39</b>
	COMM	
<b>Filed on Behalf of:</b> Sandlin Broadcasting Co., Inc.		
<b>Filed By:</b> Swidler Berlin Shereff Friedman, LLP [REDACTED]		
<b>Proceeding 99-13</b>	<b>Type Code: LT</b>	<b>Date Received: 04/06/99</b>
<b>File Number: 2</b>	<b>Submission Type:</b>	<b>Total Pages: 3</b>
Letters	LETTER	
<b>Filed on Behalf of:</b> Numerous		
<b>Filed By:</b> [REDACTED]		
<b>Proceeding 99-13</b>	<b>Type Code: LT</b>	<b>Date Received: 04/05/99</b>
<b>File Number: 2</b>	<b>Submission Type:</b>	<b>Total Pages: 3</b>
Letters	LETTER	
<b>Filed on Behalf of:</b> Numerous		
<b>Filed By:</b> [REDACTED]		
<b>Proceeding 99-13</b>	<b>Type Code: LT</b>	<b>Date Received: 04/02/99</b>
<b>File Number:</b>	<b>Submission Type: LETTER</b>	<b>Total Pages: 1</b>
<b>Filed on Behalf of:</b> Bay City Independent School District		
<b>Filed By:</b> [REDACTED]		

<b>Proceeding 99-13 Type Code: LT</b>	<b>Date Received: 04/02/99</b>
<b>File Number:</b>	<b>Submission Type: LETTER Total Pages: 1</b>
<b>Filed on Behalf of: William M. Johnson</b>	
<b>Filed By:</b> [REDACTED]	

<b>Proceeding 99-13 Type Code: LT</b>	<b>Date Received: 04/02/99</b>
<b>File Number:</b>	<b>Submission Type: LETTER Total Pages: 2</b>
<b>Filed on Behalf of: Bert L. Huebner</b>	
<b>Filed By:</b> [REDACTED]	

<b>Proceeding 99-13 Type Code: CO</b>	<b>Date Received: 03/22/99</b>
<b>File Number:</b>	<b>Submission Type: COMMENT Total Pages: 19</b>
<b>Filed on Behalf of: Prawn Broadcasting Company</b>	
<b>Filed By: Henry E. Crawford, Attorney At Law</b> [REDACTED]	

<b>Proceeding 99-13 Type Code: NP</b>	<b>Date Received: 01/13/99</b>
<b>File Number:</b>	<b>Submission Type: NPRM Total Pages: 11</b>
<b>Filed on Behalf of: Policy and Rules Division</b>	
<b>Filed By: FCC</b> [REDACTED]	

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updated 03/25/98

## CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing Motion to Strike have been served by United States mail, postage prepaid this 26th day of April, 1999 upon the following:

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C. Glen Walker  
Discipleship Ministry  
First Baptist Church of Bay City  
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William E. Ros  
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Bay City, TX 77414

Lloyd W. Barr  
117 Lindsay  
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Karen Roberson  
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Bobby Rodigy  
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Ted Lynch  
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Old Ocean, TX 77463

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Bay City, TX 77414

Emily Humble  
1918 Willow  
Bay City, TX 77414

Charles Martinez, III  
2233 Avenue 6  
Bay City, TX 77414

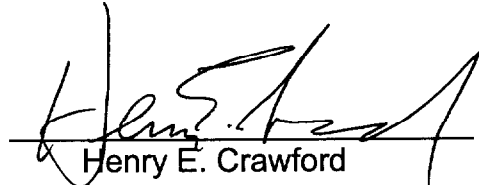
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Brent Marceaux  
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Ernest Opelles  
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Bay City, TX 77414

\*Hand Delivered

  
Henry E. Crawford